



[In Construction Your Contract May Not Always Preclude a Negligence Claim](#)



Here at [Construction Law Musings](#) I have discussed the interaction of the so called "[economic loss rule](#)," [construction contracts and tort claims](#) on numerous occasions. The general rule is that where a duty to perform in a certain way arises from the contract, the Virginia courts will not

allow a plaintiff to turn [a contract claim into a tort claim](#) such as fraud or negligence.

However, each [Virginia Supreme Court](#) session seems to come up with at least a few interesting construction related cases. As reported recently in [Virginia Lawyer's Weekly](#), [Kaltman v. All American Pest Control](#) (PDF) makes for a good primer on the distinctions necessary to make a negligence or other tort claim in the context of a construction or other service contract. In short, the Court reiterated that, in certain limited circumstances, a single act or omission can give rise to both a contract and a tort claim depending upon the source of the duty.

The basic facts of the Kaltman case are that All American Pest Control allowed an unlicensed pest control technician to perform quarterly maintenance on the Kaltman home. The technician improperly failed to maintain his equipment resulting in harmful pesticides being applied in an improper manner that the plaintiffs alleged resulted in personal injury. The plaintiffs further alleged that *outside of the contractual duty to control pests* the extermination company was required by both [the statute requiring the proper use of pesticides](#) and common law to exercise prudence in dealing with these harmful chemicals. The Fairfax, VA Circuit Court sustained All American's demurrer (motion to dismiss) on the grounds that the contract was in place and therefore the negligence claims could not stand.

Somewhat surprisingly, the Virginia Supreme Court reversed the trial court's ruling regarding the negligence counts. The Court stated that the Complaint stated enough facts regarding a *duty separate and apart from the contract* to survive dismissal. In short, the Court stated that the duty to "control pests" found in the service contract at issue did not relieve the pest control company from its statutory and common law duties to be careful with harmful chemicals.

The takeaway? First, this case is not that out of line with [prior cases relating to fraud](#) that held that where actions by a contractor that violated a separate duty (in those cases not to commit fraud to procure a construction job), the contract would not protect that party. Second, where personal injury or other damage occurs, all is not lost when a construction or service contract is involved. With the help of an [experienced attorney](#), homeowners and other people involved in the construction process may be able to move beyond or parallel to the contract in the proper circumstances.

I recommend this case to all Virginia attorneys that work in the construction law area because it gives a great rundown on the factors that the Virginia courts will examine when deciding if your clients have rights to recovery outside of the bare terms of the contract.

Update: Check out Tim Hughes' [further discussion](#) at his Virginia Real Estate, Land Use, and Construction Law Blog.

Image via [Wikipedia](#)

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